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COURT OF CRIMINAL APPEALS
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No. PD-1225-19

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
4/7/2020
DEANA WILLIAMSON, CLERK

ORLANDO BELL, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Burleson County

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Orlando Bell.

*The case was tried before the Honorable J.D. Langley, Presiding Judge, 21st District Court, Burleson County, Texas.

*Counsel for Appellant in the trial court was Elizabeth Zweiner, 218 North Main Street, Bryan, Texas 77803.

*Counsel for Appellant on appeal is Christopher Matthew Dillon, P.O. Box 446, Bastrop, Texas 78602.

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IN THE COURT OF CRIMINAL APPEALS

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ORLANDO BELL, Appellant

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

An error in the part of a charge that authorizes a greater punishment is still a charge error. This Court has a standard of review for that.

STATEMENT OF THE CASE

Appellant was convicted of failure to register and sentenced as a habitual offender pursuant to TEX. PENAL CODE § 12.42(d).[1] He did not challenge any aspect of his sentence on appeal.[2] The court of appeals reversed appellant's punishment, calling it an illegal sentence because the "habitual" jury instruction left out a

[1] 1 CR 148.

[2] Appellant challenged the sufficiency of the evidence of conviction.

sequencing detail.[3] It denied the State's motion for rehearing in a separate opinion.[4]

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was not requested.

ISSUES PRESENTED

1. **Should error in the punishment enhancement charge be reviewed as charge error rather than as an "illegal sentence"?**

2. **What standard of harm applies to charge errors that authorize a greater punishment?**

STATEMENT OF FACTS

Appellant was indicted for failure to comply with sex offender registration.[5] His indictment included language invoking the habitual enhancement provided for by TEX. PENAL CODE § 12.42(d).[6] The two prior offenses alleged, however, plainly had the same date of conviction.[7] Indeed, they had sequential cause numbers: 11,724 and 11,725.[8] The State corrected this with a separate notice of enhancement that

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[3] *Bell v. State*, No. 07-18-00173-CR, 2019 WL 6766462 (Tex. App.—Amarillo July 24, 2019) (not designated for publication).

[4] *Bell v. State*, No. 07-18-00173-CR, 2019 WL 6205460 (Tex. App.—Amarillo Nov. 19, 2019) (op. on reh'g) (not designated for publication).

[5] 1 CR 13.

[6] 1 CR 13.

[7] 1 CR 13.

[8] 1 CR 13. All cause numbers are from the 21st District Court.

retained 11,724 but alleged 10,560 as the first final conviction.[9]

The State introduced a pen pack for each offense through its investigator, who also did the fingerprint comparison.[10] Cause number 10,560 had two counts of delivery of a controlled substance less than 28 grams.[11] It is unclear which count was intended to be used but the details are the same: on September 9, 1994, appellant was adjudicated and sentenced to eight years on each count to run concurrently;[12] he received 513 days jail time credit for both;[13] and he filed no notice of appeal.[14]

Cause number 11,724 was one of three offenses contained in State's Ex. 21.[15] The judgment reflects that appellant engaged in organized criminal activity on August 21, 1997.[16] He pled guilty on November 5, 1997, and was sentenced to ten years in prison, credited 29 days, and did not give notice of appeal.[17]

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[9] 1 CR 59.

[10] 4 RR 57-58. *See* 5 RR 40 (State's Ex. 13 (10,560)), 56 (State's Ex. 14 (11,724)). Volume 5, the exhibit volume, will be cited using PDF pagination.

[11] 5 RR 43 (Count 1), 48 (Count 2).

[12] 5 RR 45, 50.

[13] 5 RR 42.

[14] 5 RR 45, 50.

[15] 5 RR 61-64.

[16] 5 RR 61.

[17] 5 RR 61-64.

The sequence of appellant's commissions and convictions was undisputed at trial. The full extent of appellant's punishment case was to cross-examine the State's investigator on the number of points he used for fingerprint comparison.[18]

Unfortunately, the punishment charge did not properly state the law. Although it required the jury to find that each prior conviction became final prior to the commission of the trial offense, it did not require that the second offense (11,724) be committed after the first conviction (10,560) became final. Rather, it required the jury to find that the *conviction* in 11,724 became final after 10,560 *was committed*.[19] In other words, "commission" and "conviction" were reversed. The verdict form paralleled this error.[20]

Appellant's closing argument did not challenge the finality or sequencing of the prior convictions. Instead, defense counsel argued that the habitual enhancement allegation was not proven because 10,560 became final in 1994, not 1991 as mistakenly required by the charge.[21]

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[18] 4 RR 60.

[19] 1 CR 130 (" . . . and that such conviction became a final conviction prior to the commission of the offense for which you have found him guilty and after the commission of the offense charged in paragraph (2) of this indictment.").

[20] 1 CR 138 (". . . and we do further find that after the commission of the offense alleged in paragraph No. (2), the defendant was convicted of the felony offense of Engaging in Organized Criminal Activity as alleged in paragraph No. (3).").

[21] 4 RR 71-72. He was placed on deferred supervision in 1991.

The State's closing punishment argument was directly on point. It opened:

> Our law says that a person commits a felony offense, goes to prison for that offense, gets out, commits a new felony offense, goes to prison for that offense, gets out and commits another, the minimum is 25 years. That's the law. And that's what the State is asking you to do. Find that in fact he is one and the same individual that in Cause No. 10,560 went to prison, that after he got out of prison for this cause number, he committed the second offense, Cause No. 11,724, and he went to prison. And when he came back out, he committed the offense that you found him guilty for today. That's the law.[22]

In context, the State's shorthand version moments later said the same thing.[23]

The jury retired to deliberate at 3:05 pm.[24] At some point, the jury asked for "the two pen packs."[25] They announced they reached a verdict at 3:56 pm.[26] The jury found the habitual allegations true and sentenced appellant to 50 years in prison.[27]

SUMMARY OF THE ARGUMENT

An error in the jury charge is jury charge error, even when it affects punishment. This Court has repeatedly said so. This Court has also said that unpreserved charge error, even of constitutional dimension, is evaluated for egregious

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[22] 4 RR 73.

[23] 4 RR 74 ("Find that he's one and the same individual who's been to prison twice consecutively and after those two pen trips committed this offense.").

[24] 4 RR 75.

[25] 1 CR 136. The jury notes have times written on them which appear to reflect when the clerk received the notes as part of the record, as the times are after the jury returned with a verdict. 1 CR 136-37; 4 RR 76.

[26] 4 RR 76.

[27] 4 RR 77; 1 CR 138.

harm. When the proper standard is applied, it is clear that appellant suffered no egregious harm from the failure to properly instruct the jury on the sequencing of prior felony convictions.

ARGUMENT

I. Jury charge error is jury charge error.

Habitual enhancement requires that the first conviction be final before the second offense is committed.[28] A proper jury finding on sequencing is required because it increases the penalty for the offense.[29] The error in the charge in this case prevented that jury finding. But that fact, on its own, does not make a sentence illegal, void, or otherwise beyond further review.

Regardless of whether the finding the jury must make relates to a fact essential to conviction or a discrete punishment issue, the Supreme Court has repeatedly explained that the failure to ask the jury to make that finding is an error amendable to harm analysis.[30] This Court has repeatedly considered those cases and concluded

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[28] *Jordan v. State*, 256 S.W.3d 286, 290-91 (Tex. Crim. App. 2008) ("[T]he chronological sequence of events must be proved as follows: (1) the first conviction becomes final; (2) the offense leading to a later conviction is committed; (3) the later conviction becomes final; (4) the offense for which defendant presently stands accused is committed.'") (cleaned up).

[29] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

[30] *Neder v. United States*, 527 U.S. 1, 8-10 (1999) (element); *Washington v. Recuenco*, 548 U.S. 212, 220 (2006) (sentencing factor).

that charge errors that affect punishment are just that—charge errors.[31] In this context, there is no meaningful distinction between an element of the offense that increases the offense level—like the "public servant" allegation in *Niles*[32]—and a designated punishment scheme that does the same thing—like Section 12.42(d) in this case.[33]

A jury finding was required but the jury was not (properly) asked. That is charge error.

II. Unpreserved jury charge error is reviewed for egregious harm.

This Court has also said that, except for some preserved claims of constitutional charge error, the appropriate standard of harm is TEX. CODE CRIM. PROC. art. 36.19 as interpreted in *Almanza v. State*.[34] That means that, absent

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[31] *Olivas v. State*, 202 S.W.3d 137, 145 (Tex. Crim. App. 2006) (failure to explicitly set out burden of proof on deadly weapon issue); *Niles v. State*, 555 S.W.3d 562, 573 (Tex. Crim. App. 2018), reh'g denied (Sept. 12, 2018) (omission of "public servant" allegation from charge).

[32] *See* TEX. PENAL CODE § 22.07(c)(2) (raising a Class B misdemeanor to a Class A).

[33] *See Recuenco*, 548 U.S. at 220 ("Assigning th[e] distinction [between an element and a sentencing factor] constitutional significance cannot be reconciled with our recognition in *Apprendi* that elements and sentencing factors must be treated the same for Sixth Amendment purposes."); *Niles*, 555 S.W.3d at 570 (discussing *Apprendi*).

[34] *Compare Olivas*, 202 S.W.3d at 145 ("Rule 44.2(a) does not apply to jury-charge error. The appropriate standard for all errors in the jury-charge, statutory or constitutional, is that set out in *Almanza*."), *with Jimenez v. State*, 32 S.W.3d 233, 237 (Tex. Crim. App. 2000) ("That statutory standard of review does not apply to some kinds of charge errors that were objected to. If the error was a violation of the federal constitution that did not amount to a structural defect, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."). *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g) (setting different standards for preserved and unpreserved claims).

objection, the failure to properly instruct on the necessary sequencing for habitual allegations is not reversible unless the appellant suffered egregious harm.[35]

To be fair, this Court's latest case, *Niles*, remanded for a harm analysis on what it identified as charge error without reaffirming the applicability of *Almanza* to this type of error. On remand, however, the court of appeals applied the egregious harm standard, citing *Olivas*.[36] That was the right decision. As this Court explained in *Jimenez v. State*, although the Supreme Court dictates the standard of review for constitutional errors, state courts fashion their own rules for preservation and presentation of complaints on appeal.[37] If an appellant fails to object, "the appropriate standard [in Texas] is the statutory one for fundamental error in the charge."[38]

Appellant did not object. Egregious harm is required for reversal.

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[35] *Almanza*, 686 S.W.2d at 171 ("[I]f no proper objection was made at trial . . . he will obtain a reversal only if the error is so egregious and created such harm that he 'has not had a fair and impartial trial'—in short 'egregious harm.'").

[36] *Niles v. State*, __ S.W.3d __, No. 14-15-00498-CR, 2019 WL 3121781, at *1-2 (Tex. App.—Houston [14th Dist.] July 16, 2019, mot. for reconsideration *en banc* denied 4/2/20).

[37] 32 S.W.3d at 238 ("But in order to invoke the protection of this federal rule in a state court, the appellant must have complied with the state court's procedural rule for preserving and presenting error.").

[38] *Id*. at 239. Although reliance on "fundamental error" as a freestanding concept is now discouraged, *see Proenza v. State*, 541 S.W.3d 786, 793-97 (Tex. Crim. App. 2017), the idea that Article 36.19 embodies the common-law concept was essential to its interpretation in *Almanza*. 686 S.W.2d at 172 (calling the language of the statute "a legislative recognition and acceptance of the fundamental error doctrine and [its] independent significance within . . . Article 36.19.").

III. The court of appeals offers no good reason to abandon this case law.

The court of appeals originally offered two reasons for its holding:

1. "[T]he State failed to meet its burden of proof concerning whether the offense was properly double-enhanced."[39]
2. Appellant's sentence was therefore illegal and void.[40]

On rehearing, it rejected *Niles*'s applicability because:

3. The omission was essential to the range of punishment, not an element of the offense.[41]
4. The State "waive[d] any right" it had to sentencing within the proper range by failing to object to the charge.[42]
5. A failure to prove proper sequencing can never be harmless.[43]

None of this is availing.

The third point can be dismissed out of hand in light of *Niles* and the cases cited therein. The fifth point is true, as far as it goes, but it begs the question appellant did not ask and the court of appeals did not answer: did the State fail to properly prove sequencing? And because it never addressed the evidence, the first and second points are conclusory, at best.

From context, what that court must have meant is that enhancement was improper because the State failed to obtain a jury finding on proper sequencing. But

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[39] *Bell*, 2019 WL 6766462 at *1 (orig. op.).

[40] *Id*. at *5.

[41] *Bell*, 2019 WL 6205460 at *2 (op. on reh'g).

[42] *Id*.

[43] *Id*.

skipping from that error to sufficiency both mistakenly conflates the two[44] and misses *Niles*'s point. A reviewing court cannot declare a sentence to be outside the proper range until it considers 1) what range the State intended, and 2) whether the failure of the charge to reflect that intent prevented a fair trial on that point.[45] Ironically, it is the State that seeks a review that addresses the state of the evidence supporting habitualization,[46] and the court of appeals that is preventing it.

Finally, the State certainly did not waive a proper finding, as the court of appeals suggested. Again, that argument was implicitly rejected in *Niles*[47] and applies with less force here: whereas the error of omission in *Niles* left a facially complete Class B jury charge, the error in this case is clearly part of a habitual enhancement paragraph. To the extent the court of appeals meant that the State forfeited the

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[44] *Cf. Roberson v. State*, 420 S.W.3d 832, 840 (Tex. Crim. App. 2013) ("Appellant does not dispute that the prior convictions did, in fact, occur in the required sequence, but rather complains about the sufficiency of the evidence based on the facially incorrect wording of the enhancement allegations in the indictment."). *See generally Burks v. United States*, 437 U.S. 1, 15 (1978) ("[R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. . . . Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, . . . incorrect instructions[.]").

[45] *Niles*, 555 S.W.3d at 573. In *Niles*, it was apparent to this Court that the State intended to pursue a "public servant" enhancement before and throughout trial. It is even more obvious the State pursued a habitual enhancement in this case.

[46] *See Almanza*, 686 S.W.2d at 171 ("the actual degree of harm must be assayed in light of," *inter alia*, "the state of the evidence, including the contested issues and weight of probative evidence").

[47] Judge Yeary, in his dissent, argued that the State's failure to object to the charge was evidence of abandonment of the enhancement. *Niles*, 555 S.W.3d at 576-77 (Yeary, J., dissenting).

appropriate standard of review, that is not possible. A court of appeals that chooses to review unpreserved, unassigned charge error must do so for egregious harm[48] and without assigning either party the burden.[49] If a proper charge is ultimately the trial court's responsibility,[50] there is no reason to treat the parties differently when there is an oversight.[51]

IV. Appellant suffered no harm.

The court of appeals did not perform a harm analysis because it believed none applied. However, the State included an argument for harmlessness in its petition and the resolution of the issue is clear and plain.[52]

A defendant suffers egregious harm when the error affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory.[53]

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[48] *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006). *See also Olivas*, 202 S.W.3d at 144 ("Thus, when jury-charge error is not raised at trial, an appellate court may review that asserted (or, as in this case, unassigned) error, but a much greater degree of harm is required for reversal when the error is not properly preserved.").

[49] *Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016).

[50] *See* TEX. CODE CRIM. PROC. art. 36.14 ("the judge shall, before the argument begins, deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case[.]").

[51] Judge Yeary's *Niles* dissent suggested, through a hypothetical, that Article 36.19 "speaks to claims of jury charge error when raised by the defendant, not by the State." *Niles*, 555 S.W.3d at 576 n.10 (Yeary, J., dissenting). Nothing in Article 36.19 limits its application to claims made by defendants. Moreover, it was the court of appeals, not the State, that raised the error in this case.

[52] *See Jordan v. State*, __ S.W.3d __, 2020 WL 579406, at *4 (Tex. Crim. App. 2020) ("if the resolution of the issue is 'clear' or 'plain,' then judicial economy justifies this Court in reaching the issue in the first instance.").

[53] *Olivas*, 202 S.W.3d at 144.

Reviewing courts should consider the charge itself, the state of the evidence including contested issues and the weight of the probative evidence, arguments of counsel, and any other relevant information revealed by the record of the trial as a whole.[54]

The charge failed to require that the first conviction was final before the second enhancement offense was committed. Nothing in the punishment charge or verdict form ameliorated that problem.[55] But the prosecutor, in her concise closing argument, clearly and in plain language asked the jury to find what the law requires by finding sequential commissions, convictions, and prison terms. And the evidence supports her argument. The pen packs the jury reviewed show that appellant was sent to prison on cause number 10,560 in 1994, filed no notice of appeal, and in 1997 engaged in organized criminal activity in cause number 11,724. This prima facie evidence of finality is presumed to be true when the record is otherwise silent.[56] At no point did appellant challenge the facial finality of the first conviction or timing of the second, through evidence or argument.

Although it is (always) theoretically possible that the evidence does not reflect reality, all indications are that the material facts went undisputed because they are true. There is thus no actual, rather than theoretical, chance a new punishment

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[54] *Id*.

[55] Defense counsel was correct about the errant date of conviction, but that is immaterial.

[56] *Fletcher v. State*, 214 S.W.3d 5, 8 (Tex. Crim. App. 2007).

hearing would result in a different outcome. As such, the error did not affect the very basis of the case, deprive appellant of a valuable right, or vitally affect any defensive theory.

V. A new punishment hearing would permit the same habitual allegation.

Finally, if the charge error was egregiously harmful, the new punishment hearing should return the parties to their respective postures immediately following conviction.[57] This includes the option of proceeding on an amended habitual allegation using the same prior convictions.[58] When a conviction is defective due to trial error, society's interest in punishing the guilty is as valid as the accused's "strong interest in obtaining a fair readjudication of his guilt free from error."[59] This applies with greater force when it is not his guilt that was disputed but the process by which his punishment range was determined. Proper consideration of Section 12.42(d) will not be a second bite at the apple; it will be the first fair bite.

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[57] TEX. CODE CRIM. PROC. art. 44.29(b).

[58] *See McNatt v. State*, 188 S.W.3d 198, 204 (Tex. Crim. App. 2006) (permitting State to use a prior conviction for enhancement on remand following reversal for improper notice in the first trial if proper notice is conveyed with respect to the new punishment hearing). In this case, the amended notice alleged proper sequencing but an incorrect date of finality for the first prior conviction. 1 CR 59.

[59] *Burks*, 437 U.S. at 15.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals and affirm appellant's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7th day of April, 2020, the State's Brief on the Merits has been eFiled and electronically served on the following:

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